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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

APPELLANT'S REPLY TO BRIEFS FOR APPELLEES.

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I.

THE COMPLAINANT IS A PROPER PARTY.

In their briefs, the United States and the Interstate Commerce Commission, and the Chesapeake Beach Railway Company, contend that there is no statute defining the class of persons authorized to maintain an action of the nature involved in these proceedings.

The appellees overlook entirely the provisions of Section 212 of the Judicial Code, referred to on page 47 of our brief. This section appears to have been inadver-

tently omitted from United States Code Annotated, but it has never been repealed and is still the law. Its provisions are similar to those contained in paragraph 20 of Section I of the Transportation Act, where it is provided that suit to enjoin construction, operation or abandonment contrary to the Act may be brought by, among others, "any party in interest." This phrase has been construed in Western Pacific California Railroad Company v. Southern Pacific Company, decided November 23, 1931, this Court saying:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite right possessed by complainant is seriously threatened or *that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.* Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened." (Italics ours).

The appellees contend that we are not a proper party because we do not possess an exclusive franchise from the State. We submit that there is no statutory or even common-sense requirement for any *exclusive* right before we may protest against an unlawful interference with our business. All that is necessary is that our welfare should be illegally threatened by a "material change in

the transportation situation," and that change is conceded, at least by the Railway Company, which estimates to deprive us of one-third of the patronage we now enjoy.

It is, perhaps, unnecessary to discuss the claim, made in Railway Company's brief, that, *on the pleadings*, the presumption is that the appellant did not have any franchise at all from the State of Maryland at the time of the hearing of this case before the Interstate Commerce Commission. The assertion is rather brazen, and the Railway Company knows that it is not founded on fact. The record contains reports filed by the appellant with the Public Service Commission of Maryland, beginning in the year 1922 (R., p. 185). It is not to be presumed that the Public Service Commission would assume jurisdiction over and accept annual reports from a common carrier operating without a franchise, and, moreover, the bill alleges distinctly that the appellant operates by virtue of a franchise granted by the State of Maryland.

II.

THE RELIEF SOUGHT IS NOT FUTILE.

The Government contends that, if the order is set aside upon the ground that the Commission was without power to make it, this would give appellant no relief "because such a decision would not set up any bar against continuation of the ferry project; it would, at most, merely advise the State of Maryland that it had jurisdiction over the proposed ferry line."

It is rather difficult to follow this reasoning. The appellant contends that authority for the general ferry may be granted only by the State of Maryland. The Railway Company seeks permission from an agency of the Federal Government, necessarily somewhat removed from contact with the local problems and situations. The ap-

pellant is subject to regulation by the State of Maryland, but its proposed competitor, if successful here, will not be bound by requirements as to rates, service, etc., which are imposed by the State. Certainly a single jurisdiction is preferable to a divided jurisdiction, and certainly the Federal Government, unless possessed of occult powers denied to the appellant, is unable to say, in advance of any consideration by the State, that a decision that the question must be decided in Maryland would not set up any bar against the ferry project. In order to reach this conclusion, the Government determines for itself that the State regulations would be no more onerous than those imposed by Federal authority, and also that the State's action on the application not yet made to it must be favorable.

The Government also (p. 19) says:

> "appellant cannot at one and the same time derive its right to bring this suit from the Act and assert that the Act does not apply to the subject matter of the controversy."

The Government misunderstands the appellant's argument. We do not assert that the Act does not apply, but we do contend that the evidence does not authorize the Commission to exercise its powers. If the Government's proposition had any substance, then nobody could complain against the Commission's illegal acts.

III.

NEW YORK CENTRAL & H. R. R. CO. VS. HUDSON COUNTY IS NOT IN POINT.

The New York Central was operating a railroad ferry from the New Jersey shore to New York. This railroad operation was regulated by the Interstate Commerce Commission. The ferry was operated in part as a gen-

eral ferry, carrying non-railroad passengers and property between New Jersey and New York. The Board of Freeholders of Hudson County, N. J., attempted, by ordinance, to prescribe rates for the non-railroad operation of the ferry.

In denying the right of Hudson County to regulate such rates, this Court held in substance that, since the Interstate Commerce Commission had jurisdiction over the interstate railroad operation, it also had jurisdiction over the interstate non-railroad business of the same ferry.

In order to bring the case at bar a little closer within his conception of the Court's decision in the New York Central case, counsel for the appellee railroad attempts to show by an extended argument that the general ferry operation of the proposed Chesapeake Beach Ferry would be in interstate commerce. Although about one-fourth of the railroad's entire brief is devoted to a discussion of this proposition, it may be answered very briefly.

In the New York Central case, an existing railroad ferry admittedly under the control of the Interstate Commerce Commission, was in operation. The question presented to this Court was whether the non-railroad interstate business of this ferry was also within the control of the Federal Government. If, in the case at bar, the power of the Interstate Commerce Commission to authorize the establishment of a railroad ferry were admitted, then the question of the Commission's control over the non-railroad business *might* be governed by the New York Central case, if the non-railroad business were actually in interstate commerce (which we do not believe).

That, however, is not the question here presented. The precise question is first, whether the Interstate Commerce Commission has the power, under the showing made in this case, to authorize the establishment of a railroad ferry. That question must be decided in favor of the appellees before the New York Central case becomes even remotely in point.

The power of the Interstate Commerce Commission to authorize the proposed ferry depends upon whether there has been a sufficient showing of a public need for a railroad ferry. Whether the evidence is sufficient upon that point to be deemed "substantial" is the primary question here involved. If the Court should determine that the evidence of public necessity for a railroad ferry is sufficient to support the certificate to that effect, then and only then will it become necessary to determine whether the Interstate Commerce Commission has the power to authorize the operation of a general ferry for intrastate traffic in addition to the railroad ferry.

IV.

THERE IS NO PUBLIC NEED FOR THE EXTENSION OF THE CHESAPEAKE BEACH RAILWAY.

We submit that the briefs of the appellees are convincing as to the lack of any public convenience or necessity for the extension of the railroad line by ferry, and support the charge that the application is a pretence to gain Federal permission for the establishment of a general ferry from point to point within the State of Maryland.

It is a rather pathetic showing of "public convenience and necessity" for a railroad, contemplating the expenditure of more than $1,000,000, to rely on the testimony of only one prospective customer. The Government, in its brief, and the railroad, in its brief, single out the testi-

mony of Edgar Morris (R., p. 100) as proof that at least somebody will ship freight via railroad and ferry. As a matter of fact, however, Mr. Morris gave no such assurance. He did use the phrase "less than carload shipments," which the Government and the Railroad triumphantly smack their lips over, but Mr. Morris, as a reading of the record shows, nowhere indicated he would use the railroad and ferry, but, on the contrary, pointed out that he is now making less than carload shipments to the Eastern Shore. These shipments, as everyone knows, go by motor vehicle trucks, or by representatives who "travel that territory regularly by automobile."

The same misunderstanding with reference to shipments of seed products and perishables was cleared up by the Examiner, when he asked about the movement of that class of freight, and was told that *it would move by truck* (R., p. 82). It is plain, from the statement made by counsel at the time, that the movement of the freight referred to was not by railroad, but by motor vehicles, traveling over the Maryland highways.

We submit that *not a single witness* testified as to any need of extending the railroad line by ferry, either for freight or passenger purposes. It was tacitly admitted that no freight business is now in existence for such a service, and not a single witness testified that there was a public need for any passenger service beginning with the railroad and ending on Seward's farm, Trippe's Bay, Dorchester County. We urge upon this Court that no such business, either freight or passenger, is practical, because, in addition to the inconveniences already pointed out, there is no place for the freight or passengers to go when the journey is completed, unless by foot (for passengers) to Cambridge, ten miles away. How the freight would reach there is yet undisclosed. The Gov-

ernment calls attention, among other things, to the possibility that persons might buy round trip tickets from Washington to the amusement park at Chesapeake Beach and to the Eastern Shore, in order that they might have a water trip in the course of a day's entertainment. It also suggests that persons traveling from the Eastern Shore to Washington might drive their cars to the eastern terminus of the ferry and complete the trip to Washington and return by the ferry and railroad, for the purpose of saving a $5.00 round trip ferry charge for the automobile. These possibilities, of course, nowhere are suggested in the record and, in the opinion of appellant's counsel, deserve no more than passing mention. Their relationship to public convenience and necessity is so remote as to strengthen the statement that there is no substance whatever in the alleged need to extend the railroad line by ferry.

V.

COLORADO V. UNITED STATES AND TRANSIT COMMISSION V. UNITED STATES ARE NOT IN POINT.

Counsel for all appellees contend that, even if there is no evidence of a public need for a railroad ferry, nevertheless the Commission would be empowered to grant the certificate upon the showing of a public necessity for a general intrastate ferry. Support for this contention is said to exist in the two cases set out in the above heading.

This, of course, is not the rule announced in these cases. The rule, as summarized in *Transit Commission, etc. v. United States*, decided by this Court on January 4, 1932, and not yet reported, is that "if, upon the whole proof, the conclusion was warranted that continued operation (of an intrastate line) would in fact unreasonably

burden the interstate commerce of the carrier, the Commission is justified in authorizing abandonment." (Italics ours).

Stated most broadly, the rule of the *Colorado* case is that where the "abandonment" of a "line," even though wholly intrastate, would be necessary or even beneficial to the interstate operation, the Commission has power to order the abandonment. Conversely, where the "extension of a line," even though wholly intrastate, would be necessary or beneficial, the power *might* exist in the Commission to authorize the extension.

In both instances, however, the benefits or necessities must flow from the "abandonment" or "extension" of the "line." In the case at bar, the evidence reveals no benefits from and no necessity for the extension of the line, i. e. for a railroad ferry. If there were any evidence showing a benefit to be derived from the extension of the Railway Company's line by ferry—i. e. by a railroad ferry—the *Colorado* and *Transit Commission* cases *might* have some application here. Under the facts at bar, however, they are not in point.

VI.

APPELLANT'S ALLEGED ILLEGAL PROFITS.

Counsel for the Railway Company devotes considerable space to a discussion of what he terms "monopolistic" and "illegal" profits earned by appellant, the nature of which, he says, do not entitle appellant to seek relief in a proceeding in equity.

It is not believed that this Court will care to examine, in this proceeding, the reasonableness of the return which appellant has earned on its investment. It is sufficient to point out that the Maryland Public Service Commis-

sion is charged with the duty of regulating ferry rates and will not be presumed, certainly in any collateral attack, to have been negligent or derelict in the performance of its functions.

WHEREFORE, having fully answered the various contentions above discussed, it is again submitted that the decree below should be reversed.

Respectfully submitted,

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